U.S. Department of Labor

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CASE NOS.: 2002-LHC-0499/1539

OWCP NOS.: 1-146862/146841

In the Matter of:

LYN TYRONE
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Edward W. Murphy, Esq
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on May 6, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official transcript, ALJ EX for an exhibit offered by this

Administrative Law Judge, CX for a Claimant's exhibit DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 11	Attorney Embry's letter filing his	06/20/02
CX 12	Fee Petition	06/20/02
RX 6	Employer's Response to the Fee Petition	06/20/02

The record was closed on June 20, 2002 as no further document were filed.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on May 6, 2000 in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an information conference on August 1, 2001.

7. The applicable average weekly wage is $769.69.

8. The Employer voluntarily and without an award has paid certain compensation for certain periods of time.

The unresolved issues in this proceeding are:

1. Whether Claimant's disability is causally related to his maritime employment.

2. If so, the nature and extent of Claimant's disability.

3. Whether the so-called **PEPCO** rule applies herein.

4. The date of his maximum medical improvement.

5. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Lyn Tyrone ("Claimant" herein), fifty-five years of age, with a high school education and an employment history of manual labor, began working on August 18, 1965 at the Groton, Connecticut shipyard of the Electric Boat company, a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Claimant left the shipyard in 1966 when he was drafted into the U.S. Army; he served honorably and returned to the shipyard in 1969. As an outside electrician Claimant had duties of pulling and hooking up cables, and then mounting and installing electrical components and other such equipment. He worked mostly on overhaul work, work that he described as being dirty and dusty. He worked in close proximity to other trades who were performing their assigned duties. According to Claimant, welders generated smoke and fumes, and the gouging, grinding and burning also produced smoke and dust. In fact, there was so much smoke and dust in the ambient air of the work environment that it was difficult to see from one end of the compartment to the other. During the overhaul of an already commissioned submarine, Claimant had to tear apart old asbestos covering from the pipes and other machinery, and the cutting and removal of the asbestos caused asbestos dust and fibers to float around the work environment. He also worked in close proximity to the pipe laggers who were cutting and applying asbestos as insulation around the heating pipes. He then became an electrical inspector but he continued to have the same exposures to asbestos and other injurious pulmonary stimuli. He started smoking cigarettes at age 12 or 13 and he finally has stopped smoking recently upon his doctor's advice. (TR 22-36)

According to Claimant, the use of asbestos was phased out in the new construction of submarines in the mid-1970s but he continued to work on overhauls well after that time period, Claimant remarking that his last exposure to asbestos was in 1976 or 1977 and that he continued to have exposures to other injurious stimuli until his last day of work on May 6, 2000. Claimant has sustained a number of injuries in the course of his almost thirty-five (36) years of his work for the Employer. (TR 36-60)

Claimant's multiple medical problems are reflected in the medical reports in this closed record, the most pertinent of which

will be discussed herein.

Claimant's orthopedic problems are summarized in the July 18, 2001 report of Dr. William A. Wainright wherein the doctor states as follows (CX 8):

HISTORY: This patient is a 54-year-old man seen for Independent Medical Examination (sic). He states he is right hand dominant. He has been employed a total of 35 years at Electric Boat. He was employed as an Electrician from 1967 through 1973. Since that time he was employed as a nuclear electrical inspector. For the last two years he has again been working as an electrician due to slow downs at Electric Boat. He has been out of work since May of 2000. He states his height is about 5' 10". He states his weight is 170 pounds. He has an admitted smoking history of two packs a day. He states this has recently decreased to one-half pack of cigarettes a day. He claims good general health. He denied diabetes mellitus, thyroid disease, or Lyme disease. He does have chronic obstructive pulmonary disease. He is on multiple medications for cardiac and pulmonary and conditions. His medication list includes nine medications. He has been disabled from working since May of 2000 because of his medical condition. His primary problem is his COPD (chronic obstructive pulmonary disease). While working at Electric Boat he did use air-powered tools as an electrician. Most of his years spent as a nuclear electrical inspector did not require use of air-powered tools. He did sustain an injury to his left elbow while at work, and had treatment for elbow bursitis. He states he's had no surgical procedures to the hands or arms. He does work part-time at the Mystic Aquarium as an electrician. This job was done in past years, and he has also been disabled from this job due to chronic obstructive pulmonary disease. His hobbies include fishing.

His medical records available for review include records of an L4-L5 low back fusion. This was performed by Dr. Robert Jung. He was seen by Dr. Jung in April of 1996. A fracture of the proximal phalanx of the right thumb was noted. Closed reduction was performed. The patient was placed in a cast.

The patient was seen in follow-up by Dr. Jung from May of 1996 through July of 1996. Good healing was seen.

The patient was seen for nerve conduction studies at Neurology Associates on February 20, 2001. Studies showed a moderate bilateral median mononeuropathy at the wrist, and a moderate ulnar neuropathy at both elbows.

A handwritten note from Dr. Cherry dated March 12, 2000, is reviewed. His medical disability was discussed. Surgery was deferred. A lack of nighttime paresthesias was mentioned. Multiple medications were also mentioned, and no additional medicine was prescribed. Impairment rating was given.

The patient was again seen by Dr. Cherry in December of 2000. Condition was discussed. Impression was mild to moderate carpal tunnel syndrome. Nerve conduction studies were repeated on February 19, 2001.

The patient presents at our office today complaining of numbness in his left hand. He complains of cramping in his right hand. He feels the left hand is numb "all the time." He has minimal component of nighttime paresthesias. He does not [have] morning stiffness and paresthesias. With use of his hands his discomfort becomes worse, especially in the right hand with cramping.

EXAMINATION: On examination there is good use pattern of the hands. No loss of soft tissue bulk in the distal segments. No ulceration of the skin is seen. The hands are warm today. There is a pale discoloration compared to normal color, but this is symmetric in both hands. Range of motion of the fingers, wrists, and elbows is symmetric. Examination of the elbows shows no tenderness over the epicondyles bilaterally. There is some thickening of the ulnar bursa bilaterally. Examination of the cubital tunnels shows no tenderness. Tinel's sign and elbow flexion tests are negative bilaterally. Tinel's sign at the wrist is negative. Phalen's test is markedly positive bilaterally with increasing paresthesias at 10 seconds on the right side, and 15 seconds on the left side. Thenar strength appears to be clinically intact. Allen's test shows no delayed filling of the radial and ulnar arteries. Thoracic outlet stressing reproduces no paresthesias in the hands. Cervical spine range of motion reproduces no radicular signs. Grip strength measures 75 pounds on the right, and 75 pounds on the left. Pinch strength measures 20 pounds on the right, and 20 pounds on the left. Two-point discrimination is normal with values of six millimeters in the thumb, index, middle, ring, and little digits bilaterally. Monofilament testing is mildly elevated with values of 3.6 for the middle and little fingers bilaterally.

IMPRESSION: 54-year-old man with 35-year work history at Electric Boat. Unfortunately, **he is totally disabled due to severe chronic obstructive pulmonary disease**. Regarding his hands he does have complaints of numbness in the left hand, more so than the right. On his physical examination he has findings consistent with peripheral nerve entrapment at the wrist level. He has mild abnormalities on his monofilament testing in both hands, both in the middle and little digits. (Emphasis added)

In my opinion, he does have a 10% impairment of each hand due to peripheral nerve injury. He does have some complaints of white discoloration in the hands when exposed to cold temperatures. He does have a history of using air-powered, vibrating tools on occasion, although this is limited compared to the usual work at Electric Boat.

The patient has not had vascular studies performed at the William W. Backus Hospital. I would like to see the results of vascular studies before giving an opinion on any partial impairment of the hands due to vascular injury.

The patient's above mentioned neurologic problems are more likely than not related to the use of his hands while employed at Electric Boat.

His severe cardiac and pulmonary disease is a preexisting condition making his current problems materially and substantially worse.

Regarding his upper extremities, there is no need for work restrictions at the present time. This might change after the results of his vascular test are known. **At any rate, he is disabled due to his severe medical condition.** (Emphasis added)

His rating are given using the AMA **Guides**, Fifth Edition, according to the doctor.

Claimant's pulmonary problems are reflected in the September 6, 2001 Consultation Summary of Dr. Daniel A. Gerardi, Director, Occupational Lung Diseases, Saint Francis Hospital, Hartford, Connecticut, wherein the doctor states as follows (RX 5):

CHIEF COMPLAINT: The patient is a 54 year old male, an employee of the Electric Boat Shipyard. He is referred for the purpose of an independent medical examination (sic). He carries a substantial permanent partial impairment rating by his treating physician in regard to respiratory disease. I am asked to comment on the patient's diagnosis and any causal relationship to his employment at Electric Boat Shipyard as well as to provide a respiratory impairment rating.

INFORMATION: The patient is the primary informant for this report. There are brief records from the Electric Boat Corporation regarding workplace activity and brief records from a hospitalization at William Backus Hospital in May 2000. The patient provided no x-rays for this evaluation.

OCCUPATIONAL HISTORY: 1965 - Graduation from Fitch High School, Groton Connecticut. He worked part time as a produce clerk at Stop and Shop.

1965 - 1966 - Electric Boat Shipyard, Groton, Connecticut. He was trained as an electrician, pulling cables and installing electrical panels.

1966 - 1969 - United States Army. He was stationed in Viet Nam for one year. He was a turret repair man. He had no injuries.

1969 - Present - Electric Boat Shipyard, Groton, Connecticut. His

retirement date is set for September 7, 2001.

The patient began work as an electrician doing primarily overhaul work until approximately 1979. This involved dismantling electrical parts including electrical boxes and installing electrical panels as well as pulling cable. As anticipated, this could be dusty and dirty environment. They use certain chemicals on occasion while cleaning these electrical boxes. This included carbon tetrachloride, inhibisol, freon and alcohol. Often these were soaked on a rag which was used to wipe it clean.

In 1973, until present, he was involved in nuclear inspection, which involved inspecting reactor control panels only. He worked with new boats from the early 1980's on. He was laid-off as an inspector and came back over the previous two years as an electrician, again doing assembly work and pulling cable. He has not worked since May of 2000 because of illness.

HISTORY OF PRESENT ILLNESS: The patient is a 54 year old male, having been born 9/24/46 after a normal delivery and full term pregnancy. His childhood illnesses included a variety of earaches and nosebleeds. He did not have seasonable rhinitis but more recently has described the onset of those symptoms. There is no history of eczema, urticaria, heart murmur, asthma or whooping cough. He was not active in sports while in high school.

The patient has been a cigarette smoker from age 12 until present. He smoked a maximum of 1 ½ packs of cigarettes daily for this time and although smoking less than this now, this would give him an estimated pack year total of 63.

With regard to respiratory symptoms Mr. Tyrone believes his symptoms began an estimated three or four years ago with shortness of breath. He felt he could not work as hard or carry as heavy a load at work and perhaps had less stamina.

The patient was diagnosed with pneumonia in 1996, or 1997, and he believes again in May of 2000, both of these pneumonias requiring hospitalization. It was here that he was told he had "COPD" or chronic obstructive pulmonary disease. During his first hospitalization for pneumonia he met Doctor Robert Bundy, a pulmonologist. The patient has not worked since May 2000 and later corrects himself saying he may not have had pneumonia on that later date but was treated with antibiotics.

Records from Electric Boat in 1995 indicate that at the time the patient was smoking one pack of cigarettes daily for at least 30 years. Diminished breath sounds and wheezing was (sic) heard on physical examination, an indication of chronic obstructive pulmonary disease. The record indicates that the patient was advised to discontinue smoking.

In December 1997 a spirometry is noted, at which time the patient had severe airflow obstruction with an FEV1 of 1.4 liters, only 37% of predicted for his age, and a reduced peak flow, further indication of substantial airflow obstruction at an early age. An x-ray performed at the time had a B-reading and this showed old rib fractures but no evidence for asbestos related lung disease. There was, however, evidence of scarring in the right mid lung field, thought to be related to his pneumonia in 1996 and there is definite evidence for emphysema He received annual flu shots while at the Electric Boat Shipyard. There is a note from April 1999 that indicates the patient was coughing up sputum and was thought to have exacerbation of his chronic obstructive pulmonary disease and was advised to see his primary care physician. There are multiple orthopedic injuries that were mostly minor and will not be mentioned further in this report.

The patient was admitted to William W. Backus Hospital in Norwich, Connecticut on or about May 6, 2000. Full details of the record are not available [but] there are various laboratory reports and x-ray readings as well as a summary sheet describing some of the features of that hospitalization. The principle (sic) diagnosis was “respiratory distress” related to acute and chronic bronchitis. Other diagnoses included Cardiomyopathy, anemia and hypertension. An x-ray of the chest was performed and showed emphysema with bullous lung disease. There was suspected interstitial disease but I suspect this may have been due to crowding of the lung markings related to the bulla. Also of significant importance were echocardiographic and Persantine exercise test studies which showed the patient had a dilated left ventricle with a substantially reduced left ventricular ejection of only 22% of predicted. It is not clear what further cardiac evaluation occurred with the exception of an echocardiogram and exercise study.

Currently the patient does complain of shortness of breath but its degree varies on a day to day basis, although this has probably worsened over the last couple of years. Weather such as hot, humid weather seems to make it more pronounced. He has a daily cough, especially in the morning, that is productive during those hours. There is no hemoptysis. He does have a history of bronchitis, as previously mentioned, and has had antibiotic treatment on multiple occasions. Upper respiratory infections always go to his chest, a further sign of chronic obstructive pulmonary disease. there has been some recent post nasal drip but this is not a regular symptom. There is occasional gastroesophageal reflux disease.

Estimating his work capacity the patient believes he does not have shortness of breath with activities of daily living. Walking a distance as short as 50 feet would begin some shortness of breath but he estimates he could walk about one quarter mile before having to stop because of shortness of breath. He is able to accomplish one flight of stairs but not two without stopping, again because of shortness of breath. On estimating his ability to carry weight, he

can carry 35 pounds 25 feet at least, and possibly carry 50 pounds, but he could not carry this type of weight upstairs or an elevation.

PAST MEDICAL HISTORY:

Medications
Vasotec, 10 mg. BID
Atenolol, 50 mg. QD
Furosemide, 20 mg. QD
Digoxin, 25 mg. QD
Hydralazine, 25 mg. QD
Combivent, 2 puffs, with spacer, QID
Serevent, one puff QHS
Flovent-110, 2 puffs BID
Multivitamin

Allergies
Keflex - Itching

Past Medical History
Hypertension, essential
Cardiomyopathy

Past Surgical History
Carpal tunnel syndrome, bilateral, without surgical intervention
Lumbar disc disease and possible fusion, approximately 1997

Risk Factors
Alcohol - Approximal daily use of alcohol, estimating minimum of one six pack per week
Transfusion - Flu - annual
Pneumonia - approximately 1996
Tetanus - uncertain . . .

LABORATORY STUDIES:

Pulmonary Function Testing - A complete pulmonary function study is performed today, a copy enclosed. This study reveals severe, fixed airflow obstruction with an FEV1 of only 790cc., 20% of predicted. There was evidence for chest distension and notable air trapping with a massively elevated residual volume of 5.7 liters, 270% of predicted. Gas mixing is also prolonged. Diffusion capacity is severely reduced and only 23% of predicted but unadjusted for hemoglobin. In summary, this study is consistent with severe chronic obstructive pulmonary disease, pulmonary emphysema.

X-Ray - A radiograph of the chest in the PA and lateral position is obtained today and is available for review. This is an abnormal film in that there is evidence for chronic obstructive pulmonary

disease. There is diffuse hyperinflation of the lungs with flattened hemidiaphragms and in obtuse sternal diaphragmatic angle. Substernal air space is also notably enlarged, all of which is consistent with large lung volumes and chronic obstructive pulmonary disease. There is an abnormality in the right mild lung field, a streak-like density in the upper lobe with minimal pleural blunting at the right costophrenic angle. This would appear to be consistent with a prior pneumonia and resolved effusion with some adhesions. There is no evidence for pleural plaquing or asbestos related lung disease.

IMPRESSION

1. Chronic obstructive pulmonary disease, pulmonary emphysema.

2. Active cigarette smoking.

3. Cardiomyopathy with reduced left ventricular ejection fraction.

4. Hypertension, essential.

5. Alcoholism, suspected.

6. History of lumbar disc disease, status post operative intervention.

7. History of bilateral carpal tunnel syndrome.

8. Umbilical hernia, small.

9. Allergy, cephalexin (Keflex).

COMMENTS AND RECOMMENDATIONS: Mr. Tyrone is suffering from chronic obstructive pulmonary disease. The evidence for this is myriad. This is related to his history of cigarette smoking, which was begun at an early age and carried on through and beyond the time which he has become symptomatic from his disease.

Physical examination findings are consistent with chronic obstructive pulmonary disease with diminished breath sounds and hyperresonance. His radiograph is also pathomonic for emphysema. His pulmonary function study reflects severe airflow obstruction with air trapping, chest distention, poor gas mixing and a diffusion impairment, all of which is very typical with an advanced case of chronic obstructive pulmonary disease. This disease is further complicated by the patient’s continued cigarette smoking which will only serve to accelerate loss of lung function over time.

I do not see a relationship to Mr. Tyrone’s lung disease to his

work exposures at the Electric Boat Shipyard. Certainly, he was exposed to asbestos to some degree during the early days in his work at the Electric boat shipyard but there is no evidence of asbestos related lung disease. He worked with some chemicals that would be irritants, again during the early portion of his work at Electric boat Shipyard, but there is no evidence the patient had symptoms at the time of exposure nor would these be causative for pulmonary emphysema. Continued cigarette smoking, however, in the setting of advanced pulmonary emphysema, is a poor prognostic sign and he is encouraged to discontinue this at once.

Mr. Tyrone's symptoms are further complicated by a dilated cardiomyopathy and severely reduced left ventricular ejection fraction. While unrelated to emphysema, it does add further impairment and I would think coupled with his advanced respiratory disease, would make him so severely impaired that he is unable to continue in gainful employment. His retirement from Electric Boat was anticipated at the time of his interview and I suspect this to be concluded. Clearly, **these multiple ailments in addition to likely alcoholism, would make any respiratory impairment materially and substantially worse than it would have been without concurrent illness**.

Therefore, using reasonable medical judgment, and the **AMA Guide to the Evaluation of Respiratory Impairment**, 5th edition, 2001, I would ascribe Mr. Tyrone a 60% impairment for both lungs and the whole person. The entirety of this impairment is related to pulmonary emphysema that is advanced and related to the patient's continued and long standing history of cigarette smoking. I believe Mr. Tyrone has reached the point of maximum medical improvement, according to the doctor.

Claimant was also examined by Dr. Arthur C. De Graff, Jr., a noted pulmonary specialist, and the doctor states as follows in his May 3, 2002 report (CX 9):

Thank you for asking me to see Lyn Tyrone. I saw him in consultation on May 1, 2002. Mr. Tyrone's work history is as follows. On graduating from high school in 1965 he went to work for Electric Boat as an outside electrician which job he continued to do until 1973. During the time working as an outside electrician he had extensive exposure to asbestos since he worked in areas in which laggers were working in an enclosed space that was poorly ventilated in a submarine. In 1973 he became a nuclear electrical inspector in which job he continued to work until 1998. In 1998 he briefly returned to work as an outside electrician.

While a nuclear electrical inspector Mr. Tyrone spent considerable time on the boats and continued to have significant asbestos exposure until asbestos abatement procedures were put in place in 1975-1976. In addition to exposure to asbestos, he was exposed to various solvents including Inhibisol, carbon tetrachloride (CCI_4)

and freon, all of which are presently off market. He indicates that he would get “high” while using Inhibisol but does not report any significant respiratory symptoms at the time. In addition to asbestos, he was exposed to welding fumes and fumes generated by welding gougers, which would have been fumes from stainless steel welding and gouging. He was also on board boats while painters were at work, painting with Devon paint and Mare Island paint. Certain Mare Island paints are known to have caused temporary and possibly permanent respiratory damage, a toxicity which has in the past been noted.

Some workers at Electric Boat noted onset of acute respiratory symptoms with exposure to Mare Island paint which symptoms cleared on weekends and progressed during the week. Stainless steel welding fumes have also been noted to cause progressive decrease in lung function during the workday. What additional effect of Mare Island paint fumes and stainless steel welding fumes would have on lung function in the presence of asbestos inhalation is unknown.

Mr. Tyrone first noted shortness of breath beginning in 1994 following pneumonia and the shortness of breath has persisted. He again had pneumonia in 1996 which resulted in scarring of his right upper and right lower lobes and some volume loss of both lobes.

In addition to dust and fume exposures, Mr. Tyrone had been a smoker since 1961 until 2000. His average cigarette consumption during the 40 years of smoking was approximately 1 1/4 packs of cigarettes a day for a pack/year exposure of 50 pack/years.

In addition to shortness of breath, Mr. Tyrone complains of chronic cough which is productive of mucoid sputum on a daily basis. Medications include Flovent 220- mg BID, Serevent QD and Combivent QID.

Except for the episodes of pneumonia, he has had no other significant medical illness. He had back surgery in 1998 in treatment of “ruptured discs.”...

REVIEW OF SYSTEMS: Mr. Tyrone has high blood pressure and a cardiologist noted that he has some degree of cardiomyopathy. He is presently taking Acupril (An ACE inhibitor), Lasix and clonidine. He is allergic to Keflex which is manifest by “itch.” Otherwise review of systems is negative.

HABITS: As noted about, a 50 pack/year smoking history. Occasional alcohol. Mr. Tyrone has not smoked during the past seven months.

PHYSICAL EXAMINATION: Blood pressure 190/90. Funduscopic examination was unsuccessful because of myopia. The oropharynx was erythematous. Tonsils were normal. There were no neck masses noted. Chest was symmetrical. Breath sounds were diminished

throughout both lung fields. No rales or rhonchi were noted. Heart sounds were without murmur. S1 was accentuated. There were no abdominal masses present. No peripheral edema was noted.

CHEST X-RAYS: Not available since, unfortunately, Mr. Tyrone was unable to pick them up at Backus Hospital. Chest x-ray reports are available from 5/18/92. Chest x-ray on 5/18/92 reveals "voluminous chest consistent with COPD. Old fractures right 5, 6 and 7 ribs."

Chest x-ray again from General Dynamics on 9/12/94 is "compatible with COPD and rib fractures, no change."

General Dynamics x-ray of 7/19/95 shows "rib fractures, COPD, no change."

Chest CT from Backus Hospital on 11/13/96 - "There is an infiltrate in the periphery of the right upper lobe extending medially to the mediastinum. In addition there is a separate area of infiltrative scar right lower lobe adjacent to the pleura and overlying the descending aorta and vertebrae. Impression - right upper lobe and right lower lobe infiltrates. Mediastinal shift to the right indicating some degree of volume loss."

Chest x-ray of 2/25/97 - "Persistent but diminished scarring compared to 10/31/96."

General Dynamics chest x-ray 12/16/97 - "Rib fractures, emphysema, scarring. No evidence of asbestos related disease. Pneumonia right 1996."

Chest x-ray, General Dynamics 6/25/98 - "Compared with 12/16/97, old right-sided rib fractures (5 and 6) with underlying pulmonary scarring is seen. There are changes of COPD again. No new infiltrates. No new rib fractures."

LUNG FUNCTION STUDIES Performed periodically from 1994. In 1994 the FEV_1 1.36 and FVC 2.69. On 12/12/95 FEV_1 was 1.42 and FVC 4.71. On 11/14/95, FEV_1 1.95, FVC 4.76. At that time the diffusing capacity was 47% of predicted.

On 12/6/97 FEV_1 3.70. On 5/20/99 FEV_1 1.39, FVC 4.39. Thus with the exception of 11/14/96, the FEV_1 was between 1.35 and 1.42.

Other office notes were from Dr. Bundy beginning 11/5/96. At that time he was following an acute pneumonia for which Mr. Tyrone was hospitalized at Backus Hospital. Dr. Bundy's next note is dated 2/27/97 in which he indicates improvement in function. He also indicates there is much improvement in the right upper lobe infiltrate. The diagnosis at the time of hospitalization was severe right upper lobe pneumonia with associated hemoptysis (necrotizing).

Dr. Marshall Katz, cardiology associates, evaluated Mr. Tyrone on 7/12/00. He refers to an echo Doppler that is to be repeated to see if there is any improvement in that particular function. He does not indicate the degree of impairment of left ventricular function. He also indicates that he has hypertension and he was placed on medication for hypertension.

On 2/9/00 Mr. Tyrone was again seen by Dr. Bundy who indicates no recent acute decompensation. On 5/6/01 Dr. Bundy writes to you concerning Mr. Tyrone's respiratory condition. At that time he indicates that cigarette smoke is the primary contributor to development of COPD. On 5/31/01 Dr. Bundy again writes to you indicating permanent partial impairment of 70% of the whole man. He also indicates that exposure to various noxious irritants "must be considered somewhat contributory to the development of pulmonary disease."

Based on Spirometry values of 5/20/99, the most recent lung function study available, Mr. Tyrone's one-second forced expiratory volume is 34% of its predicted value and that reduction in one-second forced expiratory volume represents 65% permanent partial impairment according to **AMA Guides to Evaluation of Permanent Impairment**. While the assumption I have made in assigning permanent partial impairment is that the FEV_1 of 20%, well below predicted, represents 100% of permanent partial impairment while FEV_1 of 40% represents 50% permanent partial impairment. Of the 65% permanent partial impairment, it is my opinion that 60% of the impairment is due to cigarette smoking and **40% due to exposure to various dusts and fumes including asbestos dust, paint fumes and welding fumes to which Mr. Tyrone was exposed while working at Electric Boat**, according to the doctor. (Emphasis added)

Thank you for asking me to evaluate Mr. Tyrone.

Claimant's orthopedic problems have resulted in the following restrictions being imposed by Dr. Thomas C. Cherry, Jr., on April 10, 2002 (CX 10):

In reviewing your request and my prior notes I would restrict Mr. Tyrone from doing continuously repetitive motions requiring use of the hands and wrists such as assembly line work, or use other than for very brief periods of time (3-5 minutes out of a given hour during the course of a work day, with the intervals of use spaced on an approximately hourly basis) vibrating tools such as impact wrenches, air driven pneumatic tools such as grinders and sand blasters etc. Otherwise, no specific restrictions are indicated at this time, according to Dr. Cherry.

As already noted above, Dr. Robert J. Bundy treats Claimant's pulmonary problems and the doctor sent the following letter to the Claimant on July 16, 1998 (CX 2-8):

This is a brief correspondence to encourage you to acquire a follow-up chest x-ray, given your previously noted severe RUL (right upper lobe) pneumonia which was of necrotizing type, producing hemoptysis in the setting of chronic smoking abuse and moderately severe chronic obstructive pulmonary disease. By not doing so, you potentially place yourself at risk of a possibly occult more malignant process progressing beyond reversible management, according to the doctor.

Claimant's cardiac problems are reflected in the July 12, 2000 report of Dr. Marshall Katz wherein the doctor states as follows (CX 5):

I saw Lyn Tyrone back in the office today. He underwent a cardiac catheterization, which essentially revealed minimal coronary artery disease, and was deemed to have a nonischemic dilated cardiomyopathy. Specific report is unavailable today.

Although symptoms have improved since his hospital discharge a few months ago, he continues to have significant dyspnea on exertion, at least at a class two level.

No orthopnea, PND, no fevers, chills, although he did have a recent chest cold that is resolving. Occasional orthostatic-type of dizziness that's transient. No syncope. No palpitations. He's had occasional discomfort in the left arm that is unrelated to exertion. No leg edema. He has a chronic cough which is unchanged.

He did not take his blood pressure medicines until about one hour ago. He is not smoking.

Physical exam: Mr. Tyrone has a significant nonischcemic dilated cardiomyopathy, as well as probable significant COPD, both of which contribute to his class two function. At this point, given his laborious job, I would advocate that he not do it indefinitely because of the risk involved.

I did recommend a metabolic stress test, but he wishes to hold off for now. This would determine his overall prognosis, and certainly given his significant COPD, the test may be limited by his pulmonary function, which would also be helpful to know. In turn, it would help determine if he is even a candidate for a cardiac transplantation in the future.

We will be rechecking an echo Doppler in three months to determine if there's been any improvement in his LV function. If we see no improvement at that time, then it's not likely that he'll have any meaningful return of left ventricular function.

I have ordered a PA and lateral chest x-ray because of a small density that was noted on his x-ray at Lawrence & Memorial prior to

his catheterization. If this is also abnormal, then we'll proceed with a CAT scan of his chest as recommended by the radiologist.

I've added Aldactone 12.5 mg po qd and told him to stop his K-Dur. This may help with reduction of mortality. I have ordered a repeat BUN, creatinine, and potassium for 7-10 days from now. His most recent laboratory values in June were normal.

He was mildly hypertensive today, but he may have mild orthostasis at times. I have not increased his vasodilator therapy, which he's on moderately high doses of. I've made no other changes today and I will see him approximately three months or sooner if clinically warranted. Overall, he appears to be fairly well compensated, according to the doctor.

Dr. Cherry summarizes Claimant's bilateral hand/arm problems in his December 18, 2000 report (CX 7):

Lyn Tyrone is referred here for evaluation of problems with his hand through his attorney's office. He has worked at Electric Boat for 36 years though he has been out since May of this year due to a cardiac problem for which he is on numerous meds (see list in handwritten notes). He also has significant COPD for which he takes four inhalers. He was generally well until three years ago when he developed numbness and tingling involving the left hand and developed aching and cramping associated with numbness and tingling also though the numbness and tingling less than on the left, in the right hand that occurred particularly with writing. He was employed as a Nuclear Inspector for most of his years of work, but spent approximately 10 years working as electrician and significantly was returned to the Yard in approximately 1997 back working with tools and his hands on a day to day basis. This is roughly coincident with the time at which these hand problems, for which I am evaluating him, developed.

He has had no treatment for this, has sought no other consultations and in fact relates that he has not reported this to the Yard Hospital as yet either. Despite his cardiac and respiratory disease, he is not on any medications for problems with the hands and reports only that he is allergic to the antibiotic Keflex which caused some itching at one point in the past.

Examination is limited to the upper extremities and shows them to be symmetrical. Sudomotor function appears to be diminished overall but without significant change median versus ulnar distribution. Tinel's sign is negative in both hands but forearm compression test and Phalen's test are positive though not strongly in both hands. This does not appear to follow a specific distribution. The ulnar nerve at the elbow is negative for Tinel's sign and other findings. There is no evidence of significant arthritis, musculotendonous groups are intact including the thenar muscles. Range of motion is full and complete.

Assessment: **I believe that Mr. Tyrone most likely has a mild to moderate carpal tunnel syndrome arising directly and causally out of his work at Electric Boat and most particularly the last three years where he was returned to working at the Yard**. His symptoms have unfortunately not abated with his seven months layoff or disability for his cardiac problems. These symptoms appear unrelated to his medical illnesses as well. (Emphasis added)

Plan: I have recommended and will obtain nerve conduction studies and then see him back afterwards. I do not believe more extensive workup is indicated presently as he has no historical indication for white finger disease, auto-immune disease etc. Consequently, we will apply through Electric Boat to obtain these nerve conduction studies and once this is approved we will proceed. I do believe these problems are arising directly and causally out of his 36 years of work at Electric Boat, according to Dr. Cherry.

Dr. John P. Tauro issued the following report on February 19, 2001 (CX 6; RX 3):

As you know Mr. Tyrone is a 54-year-old right-handed gentleman with a chief complaint of numbness affecting both his upper extremities all digits of both hands. He does report some decrease in manual dexterity, decrease in grip strength as well as some nocturnal symptoms in all the digits. He denies any significant neck pain. He does suffer from chronic obstructive pulmonary disease and is disabled from that. He also has some hypertension and is status post lumbar spine surgery in 1988. No history of diabetes, cancer, GI problems. He is intolerant to Keflex. He is retired from Electric Boat in May 2000. He had worked for 25 years as a nuclear inspector. During the course of his employment he had to do a lot of writing on a daily basis. For a brief period he also did some electric work. Since his retirement he has not been working. He is currently taking Atenolol, Lasix, Digoxin, Hydralazine, Combivent, Atrovent and Seravent...

Assessment: A gentleman with symptoms of a median or perhaps ulnar neuropathy at the wrist. We will perform nerve conductions and EMG. I will send you those results under separate letterhead. Thanks for allowing me to see this pleasant gentleman. It should be noted that his grip strength was 27 kilograms on the left and 30 kilograms on the right by dynamometer, according to the doctor.

Dr. Bundy issued the following report on May 31, 2001 (CX 1):

With specific reference to the question of wether or not Mr. Tyrone's prior occupational exposure to noxious irritants at EB/General Dynamics was a contributing factor of some degree in the development of his pulmonary disease, **it is my opinion that any such exposure must be considered somewhat contributory to the development of pulmonary disease, given the known adverse respiratory effects of such agents.** (Emphasis added)

Based upon Mr. Tyrone's present respiratory clinical and physiologic condition, it is my opinion that his respiratory disease accounts for 70% of the permanent partial impairment of the whole man.

As a result of the above-noted disease and associated impairment, it is my opinion that this patient's future considerations regarding occupation be devoid of any exposure to potentially noxious fumes, chemicals, vapors, therefore, in essence, restricting any future employment to only totally clean, nonirritant ambient environments, according to the doctor.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United**

States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate**

Stevedoring Co., 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure

sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to negate the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d

Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestos-related disease and his bilateral hand/arm problems, resulted from his exposure to and inhalation of asbestos and other injurious stimuli at the Employer's shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment, as discussed further in the next section. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-

work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, the medical evidence has been extensively summarized above and, in a word, this leads ineluctably to the conclusion that Claimant's pulmonary problems are due to mixed obstructive/restrictive pulmonary disease. The restrictive component is due to Claimant's exposure to and inhalation of asbestos and other injurious pulmonary stimuli at the Employer's shipyard. The obstructive component is due to Claimant's significant cigarette smoking history, a deleterious habit he has finally discontinued. The doctors are in agreement that Claimant is disabled by his multiple medical problems and the evidence submitted by the Employer does not rebut the presumption in Claimant's favor. While Dr. Gerardi alone finds no causal relationship between Claimant's shipyard work and his pulmonary disease, I have given lesser weight to the doctor's opinion because the doctor does not discuss whether or not Claimant's occupational exposures have aggravated, accelerated or exacerbated his chronic COPD, and I find this omission to be most important. This Administrative Law Judge, in concluding that Claimant has established the above work-related injuries, has given greater weight to the opinions of Dr. De Graff, Dr. Bundy, Dr. Wainright, Dr. Cherry, Dr. Katz and Dr. Tauro.

Accordingly, in view of the foregoing, I find and conclude that this closed record conclusively establishes that Claimant sustained work-related injuries on May 6, 2000, at which time he was forced to stop working, that the Employer had timely notice thereof, that the Employer has authorized appropriate medical care and treatment and has paid certain compensation benefits to Claimant, as stipulated by the parties, and that claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as an outside electrician or as an inspector. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I

therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS

451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from May 6, 2000, when he was forced to discontinue working as a result of his work-related orthopedic injuries and his occupational disease.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28

U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has paid certain compensation benefits to the Claimant and timely controverted his entitlement to additional benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment.

Slattery Associates, Inc. v. Lloyd, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim. Claimant is also entitled to a complete annual physical examination, including pulmonary testing, to monitor his asbestos-related disease due to his increased risk to develop a malignant disease.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General**

Dynamics Corp., 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.**, 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere

existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer for almost thirty-five (35) years, (2) that he has experienced a number of injuries at the shipyard, (3) that the Employer retained Claimant as a valued employee even with actual knowledge of his multiple medical problems, and (4) that he is totally disabled by the cumulative effect of his orthopedic, cardiac and pulmonary problems, according to Dr. Bundy, Dr. De Graff, Dr. Wainright and Dr. Cherry.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on June 20, 2002 (CX 12), concerning services rendered and costs incurred in representing Claimant between August 13, 2001 and May 16, 2002. Attorney Stephen C. Embry seeks a fee of $3,689.19 (including expenses) based on 22.50 hours of attorney time and paralegal time at various hourly rates.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained, the hourly rates charged and the itemized services. (RX 6)

In accordance with established practice, I will consider only those services rendered and costs incurred after August 1, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $3,689.19 (including expenses of $135.44) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on May 6, 2000, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $769.69, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his May 6, 2000 injury.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including a complete annual physical examination, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Stephen C. Embry, the sum of $3,689.19 (including expenses) as a reasonable fee for representing Claimant herein after August 1, 2001 before the Office of Administrative Law Judges and between August 13, 2001 and May 16, 2002.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl